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Give Me Your Tired, Your Poor, Your Pregnant: The Jurisprudence of Abortion Exceptionalism in *Garza v. Hargan*

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ARTICLE

GIVE ME YOUR TIRED, YOUR POOR, YOUR PREGNANT: THE JURISPRUDENCE OF ABORTION EXCEPTIONALISM IN *GARZA V. HARGAN*

by: Kaytlin L. Roholt*

TABLE OF CONTENTS

I. INTRODUCTION.....	505
II. THE FACTS.....	507
III. THE PANEL OPINIONS.....	510
IV. THE EN BANC OPINIONS.....	512
V. THE PETITION FOR CERTIORARI	514
VI. THE D.C. CIRCUIT’S <i>GARZA</i> DECISION ELEVATES THE RIGHT TO AN ABORTION ABOVE THE CONSTITUTION’S ENUMERATED RIGHTS, FURTHER EXPANDING THE JURISPRUDENCE OF ABORTION EXCEPTIONALISM	516
A. <i>The Garza Majority Overlooked Decades of Supreme Court Precedent Holding that Unlawfully Present Aliens are Not Entitled to the Full Scope of Constitutional Rights</i>	517
B. <i>The D.C. Circuit’s Garza Decision Exemplifies the Larger Jurisprudence of Abortion Exceptionalism that Plagues the Case Law</i>	526
1. Third-Party Standing Doctrine	528
2. The Constitutional Tiers of Scrutiny	530
VII. CONCLUSION	533

I. INTRODUCTION

“[N]o legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.”

—Justice O’Connor, 1986¹

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1. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814

Since a majority of Supreme Court justices created the abortion right in 1973,² a troubling pattern has emerged: The Supreme Court has come to ignore—and even nullify—longstanding precedent and legal doctrines in the name of preserving and expanding the abortion right. And with a Supreme Court majority that is blithe to manipulate any doctrine or principle—no matter how deeply rooted in U.S. legal tradition—in the name of expansive abortion rights, it should come as no surprise that lower courts are following suit. Most recently, the D.C. Circuit fired up the “ad hoc nullification machine,”³ but this time, its victim of choice was the constitutional distinction between citizenship and alien status.

In *Garza v. Hargan*, the D.C. Circuit—sitting en banc—pronounced, for the first time, that the Constitution guarantees the right to an abortion on demand to unlawfully present aliens.⁴ The Supreme Court has long held, however, that the scope of constitutional rights accorded to unlawful aliens is limited.⁵ Rather than confront this inconvenient precedent, the D.C. Circuit entirely ignored the antecedent question of whether unlawfully present aliens are entitled to the Fifth Amendment abortion right. Instead, the court simply assumed that they are.⁶ This holding is wrong for two reasons. First, by effectively deciding that an unlawful immigrant minor, in federal custody, whose only contact with the United States was her detention at the U.S. border, was entitled to the full scope of Fifth Amendment rights, the D.C. Circuit ignored Supreme Court precedent mandating that a person must have “developed substantial connections with the country” before being accorded constitutional protections.⁷ Second, by carving out this special exception for the abortion right, the court prioritized that right over all other constitutional protections.

As this Article will discuss, the D.C. Circuit’s *Garza* decision is yet another example in a troubling line of case law that expands the right to abortion and elevates it above other constitutional rights—including those actually enumerated in the Constitution. This practice has resulted in two tiers of constitutional rights: abortion and everything else. As Justice Thomas observed in a post-*Planned Parenthood v. Casey*⁸ dissent, “[t]he Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the

(1986) (O’Connor, J., dissenting), *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

2. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

3. *Hill v. Colorado*, 530 U.S. 703, 741 (2000) (Scalia, J., dissenting).

4. *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017).

5. *See infra* note 102 and accompanying text.

6. *See generally Garza*, 874 F.3d 735.

7. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

8. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

Constitution.”⁹ In fact, the Supreme Court has invoked the ad hoc nullification machine to tear through longstanding legal doctrines and even other constitutional rights to further insulate the abortion right.¹⁰ To illustrate this point, this Article will briefly consider two such examples of legal doctrines that have suffered at the hands of the Court’s jurisprudence of abortion exceptionalism: (1) the doctrine of third-party standing and (2) the constitutional tiers of scrutiny. The Supreme Court must end its jurisprudence of abortion exceptionalism, and the Court should begin by repudiating the D.C. Circuit’s unprecedented distortion of the Constitution in *Garza*.¹¹

II. THE FACTS

In July 2017, seventeen-year-old Jane Doe—referred to by the court and parties as “J.D.”—became pregnant.¹² The public record does not identify J.D.’s home country, but she is not a citizen or resident of the United States, and abortion is illegal in her home country.¹³ In early September 2017, J.D. attempted to enter the United States unlawfully at the border.¹⁴ J.D. was immediately detained “upon arrival” and

9. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2329 (2016) (Thomas, J., dissenting).

10. See *infra* Section VI.

11. *Garza* stands at the intersection of two of the most hotly contested issues in America today: abortion and immigration. While this Article focuses on the judiciary’s preferential treatment of the abortion right, it is worth noting that the political popularity of immigration reform has motivated judges to concoct special exceptions for unlawful aliens as well. For example, in early 2018—in the midst of national debate over President Donald Trump’s immigration policies—a federal judge in the Southern District of New York made headlines by creating—and granting to an unlawful alien “the freedom to say goodbye[, and] the freedom to hug one’s spouse and children” as a “fundamental right” grounded in the Constitution. *Ragbir v. Sessions*, 18-cv-236 (KBF), 2018 WL 623557, at *1 (S.D.N.Y. Jan. 29, 2018). See also Liz Robbins, *Activist Entitled to ‘Freedom to Say Goodbye,’ Judge Rules*, N.Y. TIMES, (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/nyregion/judge-released-immigrant-ragbir.html> [<http://perma.cc/45ZM-Q47L>] (suggesting that the court’s decision was “an impassioned rebuke of the Trump administration’s immigration practices”). The plaintiff in that case, a noncitizen, was detained by immigration officials and ordered to leave the country, so he filed a petition for a writ of habeas corpus. See *Ragbir*, 2018 WL 623557, at *1 & n.2–4. Relying on only a vague reference to “[t]he wisdom of our Founders,” *id.* at *1, the court concluded that the “Constitution command[ed]” it to grant the writ and release the plaintiff from custody. *Id.* at *3. Much like the abortion right, however, the “freedom to say goodbye” has no place in the Constitution.

12. *Garza*, 874 F.3d at 743 (Henderson, J., dissenting).

13. Oral Argument at 29:19–29:34, *Garza v. Hargan*, No. 17-5236 (D.C. Cir. Oct. 20, 2017), [https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/\\$file/17-5236.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/$file/17-5236.mp3) [<http://perma.cc/T78D-HUHW>].

14. *Garza*, 874 F.3d at 743 (Henderson, J., dissenting).

held in federal custody.¹⁵ Because J.D. was an unaccompanied alien child,¹⁶ she was placed in a federally funded shelter.¹⁷

While in custody, J.D. was physically examined and was informed that she was pregnant.¹⁸ Shortly thereafter, she requested an elective—that is, not medically necessary—abortion.¹⁹ Named plaintiff Rochelle Garza was appointed guardian ad litem for J.D., and Ms. Garza successfully navigated Texas’s judicial-bypass procedure—which exempts a minor from the requirements of parental-consent laws—to ensure J.D. complied with Texas state abortion law.²⁰

Pursuant to statute, the Office of Refugee Resettlement (“ORR”) of the United States Department of Health and Human Services (“HHS”) has authority to oversee the care of “unaccompanied alien children who are in Federal custody by reason of their immigration status.”²¹ HHS policy mandates that “[s]erious medical services, including . . . abortions, . . . require heightened ORR involvement.”²² Consistent with that policy, ORR announced in March 2017 that shelter personnel “are prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR.”²³

On October 13, 2017, after the ORR Director denied J.D.’s abortion request,²⁴ J.D. filed suit in the United States District Court for

15. *Id.*

16. *See id.*; *see also* 6 U.S.C. § 279(g)(2) (2018) (defining “unaccompanied alien child” as a child under eighteen years old who “has no lawful immigration status in the United States” and has no parent or legal guardian in the United States who can provide custody and care).

17. *Garza*, 874 F.3d at 743 (Henderson, J., dissenting); *see also* 6 U.S.C. § 279(b)(1)(A) (providing for the placement of unaccompanied alien children who are in federal custody in a detention facility or an alternative).

18. *Garza*, 874 F.3d at 744 (Henderson, J., dissenting). The record is unclear as to whether J.D. knew she was pregnant when she attempted to enter the United States. *Compare* Dissenting Statement of Circuit Judge Millett at 2, *Garza*, No. 17-5236 (D.C. Cir. Oct. 20, 2017) [hereinafter *Garza* Panel Dissent] (“After entering the United States, [J.D.] . . . learned that she is pregnant.”), *with Garza*, 874 F.3d at 744 (Henderson, J., dissenting) (“[I]t is highly likely [J.D.] knew when she attempted to enter the United States that she was pregnant, as she was at least eight weeks pregnant at the time.”).

19. *Garza*, 874 F.3d at 744 (Henderson, J., dissenting). Nothing in the record indicates that the abortion was necessary to preserve J.D.’s health. *See id.*

20. *See id.* at 736–37 (Millett, J., concurring) (“[J.D.] did everything that Texas law requires to obtain an abortion. That has been undisputed in this case.”); TEX. FAM. CODE § 33.003 (providing for judicial authorization of a pregnant minor “to consent to the performance of an abortion without notification to and consent of a parent, managing conservator, or guardian”).

21. 6 U.S.C. § 279(b)(1)(A) (2012).

22. Memorandum from ORR Acting Dir. David Siegel to DUCS Staff, DUCS Funded Shelters, DUCS Serv. Providers (Mar. 21, 2008), https://www.acf.hhs.gov/sites/default/files/orr/medical_services_requiring_heightened_orr_involvement.pdf [perma.cc/LDN8-JNL5].

23. *Garza*, 874 F.3d at 743–44 (Henderson, J., dissenting).

24. *Id.* at 744.

the District of Columbia, arguing that the denial placed an undue burden on her Fifth Amendment right to an abortion.²⁵ J.D. sought to bring the action “as a class” on behalf of herself and “all other pregnant unaccompanied immigrant minors in ORR custody nationwide, including those who will become pregnant during the pendency of this lawsuit.”²⁶ The next day, J.D. applied for a temporary restraining order and moved for a preliminary injunction.²⁷

The Government opposed J.D.’s application and motion, arguing that the Government was not required to facilitate an abortion for J.D. and that ORR did not place an “undue burden” on J.D.’s alleged right.²⁸ The Government reasoned that J.D. could either leave the country to obtain an abortion elsewhere or she could be placed with a sponsor in the United States who could help her obtain an abortion without the federal Government’s complicity.²⁹ Because these two alternatives were available, the Government argued that it was not erecting an undue burden by refusing to facilitate J.D.’s abortion.³⁰

The district court granted J.D.’s application for a temporary restraining order and ordered that the Government allow J.D. to be transported to a health facility to have an abortion.³¹ That same day, the Government appealed the district court’s order and filed an emergency motion for a stay pending appeal.³² The following day, a D.C. Circuit motions panel ordered Ms. Garza to respond to the Government’s motion by 2:00 p.m. that day and ordered the Government to file its reply by 8:00 p.m.³³ The panel—composed of Judge Henderson,

25. See Complaint, *Garza v. Hargan*, No. 17-cv-02122-TSC (D.D.C. filed Oct. 13, 2017).

26. *Id.* at ¶ 47.

27. *Garza*, 874 F.3d at 744 (Henderson, J., dissenting).

28. *Id.*

29. See Defendant’s Opposition to Plaintiff’s Motion for Temporary Restraining Order at 1–2, *Garza v. Hargan*, No. 17-cv-02122-TSC (D.D.C. filed Oct. 17, 2017).

30. *Id.* Curiously, the Government did not contest J.D.’s assumption that she—as an alien minor who unsuccessfully attempted to enter the United States illegally—was entitled to the Fifth Amendment abortion right. At the district court’s hearing on J.D.’s application for a temporary restraining order, the Government made clear that it was “not taking a . . . position” on whether J.D. was entitled to Fifth Amendment rights, but it emphasized that it was “not going to give [the court] a concession” either. *Garza*, 874 F.3d at 744 (Henderson, J., dissenting). When questioned by the court at oral argument regarding the Government’s position on J.D.’s Fifth Amendment abortion right, government counsel stated that she was “not authorized to take a position” on that issue. See Oral Argument at 8:10–8:46, 16:43–17:12, *Garza v. Hargan*, No. 17-5236 (D.C. Cir. Oct. 20, 2017), [https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/\\$file/17-5236.mp3](https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/EE442BCAB574219F852581BF0057B320/$file/17-5236.mp3) [http://perma.cc/T78D-HUHW].

31. *Garza v. Hargan*, No. Civ. A. 17-cv-02122 (TSC), 2017 WL 4707287, at *3 (D.D.C. Oct. 18, 2017).

32. See Defendant’s Notice of Appeal, *Garza v. Hargan*, No. 17-5236 (D.C. Cir. Oct. 18, 2017); Appellants’ Emergency Motion for Stay Pending Appeal, *Garza v. Hargan*, No. 17-5236 (D.C. Cir. Oct. 18, 2017).

33. *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017) (per curiam).

Judge Kavanaugh, and Judge Millett—held oral argument at 10:00 a.m. the following day.³⁴

III. THE PANEL OPINIONS

In a per curiam order, the panel vacated the portions of the District Court's order that restrained the Government from interfering with J.D.'s access to an abortion.³⁵ In so holding, the panel agreed with the Government that HHS's sponsorship policy—by which HHS releases a minor from its custody to a sponsor—“does not unduly burden the minor's right under Supreme Court precedent to an abortion[,] . . . so long as the process of securing a sponsor to whom the minor is released occurs expeditiously.”³⁶ The panel accordingly allowed HHS until October 31, 2017 at 5:00 p.m. to secure a sponsor and release J.D. to that sponsor's custody.³⁷ The per curiam order specifically permitted the District Court to re-enter a temporary restraining order or enter other appropriate relief in the event that HHS could not obtain a sponsor within the specified time frame, and the order noted that the Government could immediately appeal that relief if it so chose.³⁸

Judge Millett dissented from the per curiam order, criticizing the Government's position as “wrong and . . . unconstitutional.”³⁹ First, Judge Millett dismissed the Government's facilitation argument out of hand, stating that “there is nothing for it to facilitate” because J.D.'s guardian would transport her to the abortion facility and pay for all expenses, and a government contractor would handle all paperwork and medical care.⁴⁰ In Judge Millett's view, the Government's facilitation argument essentially claimed “not a right to avoid subsidizing the abortion decision; it claim[ed] a right to use *immigration* custody to nullify J.D.'s constitutional right to reproductive autonomy prior to viability.”⁴¹ Second, Judge Millett noted that the mere fact that J.D. is in custody does not empower the Government to override completely her choice to have an abortion.⁴² The Government permits women over the age of eighteen—just a few months older than J.D.—who are in Immigration and Customs Enforcement (“ICE”) custody to obtain abortions, and the Government facilitates the process for women in

34. *See id.*

35. *See Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. Oct. 20, 2017) (No. 17-5236) (per curiam). The panel's per curiam order did not decide whether J.D. in fact had a right to an abortion. Instead, it merely noted that “the Government has assumed, for purposes of this case, that J.D.—an unlawful immigrant who apparently was detained shortly after unlawfully crossing the border into the United States—possesses a constitutional right to obtain an abortion in the United States.” *Id.* at 3.

36. *Id.* at 2–3.

37. *See id.* at 3.

38. *See id.*

39. *See Garza* Panel Dissent at 3.

40. *See id.* at 4.

41. *Id.* (emphasis in original).

42. *See id.*

the custody of the Bureau of Prisons.⁴³ Thus, the Government's unwillingness to allow undocumented minors in custody to obtain abortions is, in Judge Millett's view, "freakishly erratic."⁴⁴ And third, Judge Millett read the Government's brief as arguing that J.D. may get an abortion if she voluntarily departs from the United States.⁴⁵ But in Judge Millett's view, "the government cannot condition the exercise of a constitutional right by women and girls on their surrender of other legal rights."⁴⁶ Judge Millett would have held, instead, that under *Casey*,⁴⁷ conditioning a woman's exercise of her fundamental right to reproductive choice on the surrender of her other rights—such as the right to seek special immigrant juvenile status—is "at the least a substantial obstacle to the exercise of her constitutional right."⁴⁸

Judge Millett went on to admonish the majority for forcing J.D. to wait for a sponsor, which would necessarily require that another adult be involved in J.D.'s reproductive decision.⁴⁹ J.D. complied with Texas law by obtaining a state court order "determining that she was (and is) mature enough to decide for herself whether to continue the pregnancy."⁵⁰ Thus, according to Judge Millett, forcing J.D. to continue her pregnancy "just in case someone else comes along with whom J.D. might also consult" imposes "layers and layers of consent-style barriers" to J.D.'s choice, in direct contravention of settled Supreme Court precedent.⁵¹

Judge Millett acknowledged the fact that neither her dissent nor the per curiam order addressed the question of whether J.D.—as an unlawfully present alien—was entitled to the protections of the Due Process Clause.⁵² But because the Government "deliberately chose[] not to challenge . . . J.D.'s constitutional right to an abortion,"⁵³ Judge Millett deemed any argument that J.D. lacked Fifth Amendment rights to be "both forfeited and waived."⁵⁴ She noted, however, that the idea that J.D. is not a "person" in the eyes of the Constitution is "deeply troubling"⁵⁵ and "profoundly unsettling."⁵⁶ According to Judge Millett, taking that argument to its logical conclusion would

43. See *id.* at 5.

44. *Id.* at 5.

45. *Id.*

46. *Id.* Judge Millett emphasized the fact that this "Hobson's Choice" was one that the federal government demanded only of *female* immigrants. *Id.* at 6.

47. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

48. See *Garza* Panel Dissent at 6.

49. See *id.*

50. *Id.* at 2.

51. *Id.* at 6.

52. *Id.* at 8.

53. *Id.* at 3.

54. *Id.* at 8.

55. *Id.* at 9.

56. *Id.*

mean that anyone in the United States without lawful documentation could be raped by government officials who hold them in detention and forced to carry any resulting pregnancies to term, even if doing so would kill the mother.⁵⁷ This result, according to Judge Millett, would unconstitutionally violate those immigrants' "basic rights to personhood."⁵⁸

IV. THE EN BANC OPINIONS

Ms. Garza immediately filed a petition for rehearing en banc.⁵⁹ Two days later, the D.C. Circuit granted the petition, and without oral argument,⁶⁰ vacated the panel's order and denied the Government's emergency motion for a stay pending appeal "substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett."⁶¹ The en banc court thus adopted Judge Millett's panel dissent as its majority opinion.⁶²

Judge Millett filed a separate opinion concurring in the en banc Court's order. Her concurrence—like her dissent from the panel order—emphasized the fact that "[t]he government—to its credit—has never argued or even suggested that J.D.'s status as an unaccompanied minor who entered the United States without documentation reduces or eliminates her constitutional right to an abortion in compliance with state law requirements."⁶³ In Judge Millett's view, where the Government "bulldozed over constitutional lines" was its position that J.D. must leave the country or wait for a sponsor in order to exercise her right to an abortion—a right that the Government did not contest that she has.⁶⁴ Judge Millett accordingly observed that the en banc decision "right[ed] a grave constitutional wrong."⁶⁵

Judge Henderson—who joined the original panel order directing HHS to find J.D. a sponsor—dissented from the en banc order, argu-

57. *Id.* Judge Millett further observed that this principle would allow government custodians to sit idly by while unlawful aliens in government custody suffer heart attacks or diabetic episodes and die. *Id.*

58. *Id.* at 9.

59. Emergency Petition for Rehearing En Banc at 1, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. Oct. 22, 2017) (No. 17-5236).

60. No judge requested oral argument on this matter. *See Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017).

61. *Id.* The use of the term "substantially" creates ambiguity as to the en banc Court's precise reasons for its decision, and this ambiguity will likely fuel debate regarding the precedential value of the en banc order in future cases. *But see id.* at 752 n.1 (Henderson, J., dissenting) ("If any members of the [en banc Court] disagreed with any of the main points of the panel dissent, they were of course free to say as much.").

62. For the sake of clarity, from this point forward, this Article refers to Judge Millett's panel dissent as "the majority," unless otherwise noted.

63. *Garza*, 874 F.3d at 737 (Millett, J., concurring).

64. *Id.*

65. *Id.* at 736.

ing that the court's decision directly undermined Supreme Court precedent on constitutional rights for noncitizens.⁶⁶ Judge Henderson would have addressed the question of whether J.D. is entitled to the protections of the Fifth Amendment and would have held that she is not.⁶⁷ Judge Henderson relied on the Supreme Court's decision in *United States v. Verdugo-Urquidez*, which held that noncitizens must have "come within the territory of the United States and developed substantial connections with the country" in order to avail themselves of the Constitution's protections.⁶⁸ In Judge Henderson's view, not only did J.D. not develop these substantial connections with the United States, but also the en banc Court did not even inquire into it.⁶⁹ Citing *Leng v. Barber*,⁷⁰ Judge Henderson argued that J.D. never entered the United States as a matter of law, and thus she is not entitled to the constitutional rights afforded to those persons who are legally within the country's borders.⁷¹ Even if J.D. were entitled to the protections of the Due Process Clause, however, Judge Henderson noted that "due process is not an 'all or nothing' entitlement," and the judiciary should not contravene the process Congress and the President have determined to be appropriate for aliens "on the threshold" of the United States.⁷²

According to Judge Henderson, the majority's holding that J.D. is entitled to an abortion "elevates the right to elective abortion above every other constitutional entitlement."⁷³ She emphasized that the Supreme Court has consistently held that noncitizens are not afforded certain constitutional rights, including the freedom of association, the freedom to keep and bear arms, the freedom from warrantless search, and the freedom from trial without jury.⁷⁴ But, under Judge Hender-

66. *Id.* at 743 (Henderson, J., dissenting).

67. *Id.* Although the Government did not contest J.D.'s claim of entitlement to full Fifth Amendment rights, Judge Henderson would have held that the Government did not waive or forfeit the argument. *Id.* at 746, n.6 (Henderson, J., dissenting). Because the question of whether J.D. has a constitutional right to an abortion is antecedent to the question of whether the Government has placed an undue burden on that right, Judge Henderson argued that the court should have considered J.D.'s entitlement to the right *sua sponte*. See *id.* at 745.

68. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

69. *Garza*, 874 F.3d at 751–52 (Henderson, J., dissenting).

70. *Leng v. Barber*, 357 U.S. 185 (1958).

71. *Garza*, 874 F.3d at 746–47 (Henderson, J., dissenting).

72. *Id.* at 748 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). Judge Henderson explained that Congress and the Executive, acting in concert, have plenary authority over immigration to which certain rights must yield. *Id.* at 750. This "plenary power," according to Judge Henderson, "requires the courts to strike a balance between private and public interests different from the due process that typically obtains." *Id.* at 748–49.

73. *Id.* at 750.

74. *Id.*

son's reading, the majority's decision makes clear that "the freedom to terminate one's pregnancy is more fundamental than them all."⁷⁵

Judge Kavanaugh—who also joined the panel's per curiam order—authored a separate dissent from the en banc Court's order, joined by Judge Henderson and Judge Griffith.⁷⁶ Like Judge Henderson, Judge Kavanaugh criticized the majority opinion as "a radical extension of the Supreme Court's abortion jurisprudence"⁷⁷ founded on a "constitutional principle as novel as it is wrong."⁷⁸ Judge Kavanaugh also pointed out that the court should have never reheard *Garza* en banc in the first place because, under the Federal Rules of Appellate Procedure,⁷⁹ en banc courts should not be convened unless the case is one that involves "a question of exceptional importance."⁸⁰ This is the case even where judges harbor "doubts about a panel's application of the law to individual litigants."⁸¹ Here, the panel's order was unpublished and thus constituted no legal precedent for future cases.⁸² And as a factual matter, the panel order did not block or significantly delay J.D.'s abortion.⁸³ Judge Kavanaugh accordingly would not have reheard *Garza* to begin with because it did not satisfy the standard for rehearing en banc.⁸⁴

V. THE PETITION FOR CERTIORARI

The D.C. Circuit's October 24, 2017 en banc order required that the Government immediately facilitate J.D.'s pre-abortion counseling and her subsequent abortion.⁸⁵ Texas state law mandates that the counseling and abortion be performed by the same physician and be sepa-

75. *Id.*

76. *Id.* at 752 (Kavanaugh, J., dissenting).

77. *See id.*

78. *Id.*

79. *See* Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless . . . the proceeding involves a question of exceptional importance.").

80. *Garza*, 874 F.3d at 756 n.6 (Kavanaugh, J., dissenting) (quoting *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689 (1960)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Petition for Writ of Certiorari at 2, *Azar v. Garza*, No. 17-654 (U.S. Nov. 3, 2017). When this case was before the district court and the D.C. Circuit, Eric Hargan was serving as Acting Secretary of the U.S. Department of Health and Human Services, and thus he was named as the lead defendant. *See* Complaint at ¶ 19, *Garza v. Hargan*, No. 17-cv-02122-TSC (D.D.C. filed Oct. 13, 2017). But on January 29, 2018, while the Government's petition for certiorari was pending before the Supreme Court, Alex Azar was confirmed as Secretary of the U.S. Department of Health and Human Services. *See Alex M. Azar II*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/about/leadership/secretary/alex-m-azar/index.html> (last visited Apr. 23, 2018). Azar was accordingly substituted automatically as the named defendant in the Supreme Court docket. *See* SUP. CT. R. 35(3) (providing that, where a public officer who is a party to a Supreme Court proceeding ceases to hold office,

rated by at least twenty-four hours.⁸⁶ Although J.D. had received pre-abortion counseling the week before the en banc court's order, the original physician who administered that counseling was unavailable to perform the abortion procedure, and so J.D. needed to obtain counseling by another doctor who would then perform her abortion twenty-four hours later.⁸⁷ J.D.'s representatives accordingly scheduled her counseling for 7:30 a.m. on October 25, 2017, and her abortion for October 26, 2017.⁸⁸ Based on this information, the Government informed J.D.'s counsel—and the Clerk's Office at the United States Supreme Court—that it would file its application for a stay of the D.C. Circuit's en banc order with the Supreme Court on the morning of October 25.⁸⁹

Sometime on October 24, however, J.D.'s original physician—who had already conducted her pre-abortion counseling the week prior—became available to perform the abortion procedure.⁹⁰ J.D.'s representatives accordingly moved her appointment from 7:30 a.m. on October 25 to 4:15 a.m. that same morning, and they changed the nature of the appointment from one for counseling to one for an abortion.⁹¹ Although J.D.'s counsel informed the Government of the change in time, they did not inform it of the change in procedure.⁹² Ultimately, the Government did not become aware of these developments until later on the morning of October 25, at which point J.D. had already obtained her abortion.⁹³

On November 3, 2017, the Government filed a petition for a writ of certiorari with the Supreme Court, arguing that the Court should vacate the D.C. Circuit's judgment and remand to the district court with instructions to dismiss any claims for prospective relief as moot.⁹⁴ According to the Government, opposing counsel's actions frustrated the Government's ability to obtain review of the D.C. Circuit's decision, and thus the Supreme Court should apply its longstanding equitable practice of vacating the judgment below.⁹⁵ Because Ms. Garza filed

"any successor in office is automatically substituted as a party"). For the sake of clarity, this Article refers to the case as "*Garza v. Hargan*," unless otherwise noted.

86. *Id.* at 11.

87. *Id.* at 11–14.

88. *Id.* at 11.

89. *Id.* at 14.

90. *Id.* at 15.

91. *Id.* at 14–15.

92. *Id.* at 15.

93. *Id.*

94. *Id.* at 19. In addition to her claims for injunctive relief, J.D.'s complaint included a claim for damages for violation of her Fifth Amendment rights, pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See Complaint at ¶¶ 64–66, *Garza*, 17-cv-02122-TSC (D.D.C. filed Oct. 13, 2017).

95. *Id.* at ¶ 21. Where a case becomes moot while on its way to appeal—and by no fault of appellant's—the Supreme Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States v. Munsing-*

her case as a putative class action, if the Supreme Court does not vacate the D.C. Circuit's decision, it could be applied to any and all class members' claims for relief.⁹⁶ The Government also submitted that the Supreme Court "may wish to issue an order to show cause why disciplinary action should not be taken against [J.D.'s] counsel—either directly by [the Supreme] Court or through referral to the state bars to which counsel belong—for what appear to be material misrepresentations and omissions to [G]overnment counsel designed to thwart [the Supreme] Court's review."⁹⁷ The Government's petition for certiorari is fully briefed and pending before the Supreme Court.⁹⁸

VI. THE D.C. CIRCUIT'S *GARZA* DECISION ELEVATES THE RIGHT TO AN ABORTION ABOVE THE CONSTITUTION'S ENUMERATED RIGHTS, FURTHER EXPANDING THE JURISPRUDENCE OF ABORTION EXCEPTIONALISM

Although the D.C. Circuit in *Garza* did not expressly decide that unlawful aliens are entitled to an unfettered right to an abortion under the Fifth Amendment, the court effectively so held.⁹⁹ But such a hold-

wear, Inc., 340 U.S. 36, 39 (1950). *See also, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) ("It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action [that] moots the dispute, and then retain the [benefit of the] judgment.").

96. Petition for Writ of Certiorari at 24, *Azar v. Garza*, No. 17-654 (U.S. Nov. 3, 2017). In the time since the Government filed its petition with the Supreme Court, the Government's fear has become a reality: the district court granted Ms. Garza's motion to certify a class of pregnant, unaccompanied alien minors who are in the custody of the federal government. *See infra* notes 173–179 and accompanying text.

97. *Id.* at 26.

98. *See* Brief in Opposition of Rochelle Garza, as Guardian Ad Litem to Unaccompanied Minor J.D., *Azar v. Garza*, No. 17-654 (U.S. Dec. 4, 2017); Reply Brief for Petitioners, *Azar v. Garza*, No. 17-654 (U.S. Dec. 19, 2017).

99. Because the Government assumed, for the purposes of the case, that J.D. had a right to an abortion, the en banc court did not expressly decide whether J.D. could invoke the Fifth Amendment's protections. *See supra* note 35. But, as Judge Henderson observed in her dissent, the court's ruling effectively decided that issue in the affirmative. *See Garza v. Hargan*, 874 F.3d 735, 746 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting) ("[A]s a result of my colleagues' decision, J.D. will soon be on her way to an abortion procedure she would not receive absent her invocation of the Fifth Amendment. If ever there were a case in which the public interest compels us to exercise our independent power to identify and apply the proper construction of governing law irrespective of a party's litigating position, this is it." (internal citations and quotations omitted)), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017). Before reversing the panel's decision and reinstating the district court's equitable relief, the court should have decided the antecedent question of whether an alien outside the United States has a constitutional right to an abortion. *See id.* at 745–46. The Supreme Court has made clear that federal courts have discretion to "avoid [constitutional] avoidance" given the need to "clarify the legal standards governing public officials." *Camreta v. Greene*, 563 U.S. 693, 706–07 (2011). As Judge Henderson pointed out, immigration officials would benefit from knowing whether pregnant alien minors detained in HHS custody are constitutionally entitled to abortions. *See Garza*, 874 F.3d

ing is as unprecedented as it is unconstitutional. By assuming that J.D.—an alien who attempted to enter the United States illegally—was entitled to an abortion, the D.C. Circuit ignored Supreme Court precedent that clearly limits the scope of noncitizens’ constitutional rights. In doing so, the court unconstitutionally expanded the Fifth Amendment right to an abortion and elevated it above all other rights, including those that are enumerated in the Constitution. The D.C. Circuit’s eagerness to give the abortion right favored status, however, should come as no surprise, given the Supreme Court’s past willingness to do the same in other areas of law. As this Article will discuss by way of example, the Supreme Court has gutted third-party standing doctrine and manipulated the constitutional tiers of scrutiny to insulate and strengthen the abortion right. But this practice is undisciplined and lawless, and it must be put to an end. The Supreme Court should seize this opportunity to begin dismantling its jurisprudence of abortion exceptionalism by correcting the D.C. Circuit’s unprecedented extension of the right to abortion on demand in *Garza*.

A. *The Garza Majority Overlooked Decades of Supreme Court Precedent Holding that Unlawfully Present Aliens are Not Entitled to the Full Scope of Constitutional Rights*

The majority opinion, which endorses Judge Millett’s view that unlawfully present aliens are entitled to the full scope of the abortion right,¹⁰⁰ erodes the fundamental difference between citizenship and alien status, in direct contravention of Supreme Court precedent. Although the Supreme Court has held that unlawful aliens are entitled to varying degrees of constitutional protections in certain circumstances,¹⁰¹ it has never held that an unlawful alien, detained immediately at the border by federal immigration authorities, is entitled to a government-facilitated abortion under the Fifth Amendment. And this is not surprising, given the framework the Court employs to determine the scope—if any—of noncitizens’ constitutional rights. In *Verdugo-Urquidez*, the Supreme Court articulated the standard for determining whether noncitizens are afforded constitutional rights, and it held that aliens are entitled to constitutional protections only when they “come within the territory of the United States” and develop “substantial connections with the country.”¹⁰²

at 746 (Henderson, J., dissenting). The D.C. Circuit therefore should have invoked its discretion to confront and decide the underlying constitutional issue in *Garza*.

100. *Garza*, 874 F.3d at 736.

101. See *infra* notes 103–13 and accompanying text.

102. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). In *Verdugo-Urquidez*, the U.S. Drug Enforcement Agency suspected that the defendant, a Mexican citizen and resident, was a leader of a Mexican organization that smuggled narcotics into the United States, so they obtained a warrant for his arrest. See *id.* at 262. Mexican police officers searched Verdugo-Urquidez’s home, arrested him, and transported

To address the varying degrees of connection an alien might have with the United States, the Supreme Court has applied a sliding scale approach to constitutional rights for noncitizens.¹⁰³ In *Johnson v. Eisentrager*, the Court explained that an alien is “accorded a generous and ascending scale of rights as he increases his identity with our society.”¹⁰⁴ Once an alien unlawfully enters the United States, he is afforded “certain rights,” which “become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.”¹⁰⁵ Thus, once unlawful aliens enter the United States, their connections with the nation directly determine the scope of the rights to which they are entitled under the Constitution. And the more substantial the aliens’ connections, the more expansive their constitutional rights.¹⁰⁶

In the Fifth Amendment context—as with all other constitutional protections—not all aliens who attempt to enter the United States receive the robust scope of Fifth Amendment rights entitled to U.S. citizens. Rather, when it comes to the Fifth Amendment’s Due Process Clause, unlawful aliens are not necessarily “due” the same panoply of Fifth Amendment protections afforded to United States citizens, or even to lawfully-present aliens. Under *Eisentrager*’s sliding-scale approach, unlawfully present aliens are entitled to certain basic procedural protections regardless of their lack of ties to the United States.¹⁰⁷

him to the United States for trial. *See id.* Verdugo-Urquidez sought to suppress evidence found in his home under the Fourth Amendment on the ground that his home was searched without a warrant. *See id.* at 263. The Supreme Court held that he could not invoke the Fourth Amendment’s protections because he was a nonresident alien and the property at issue was located in Mexico. *See id.* at 261. In so holding, the Court noted that “not every constitutional provision applies to governmental activity even where the United States has sovereign power.” *Id.* at 268. Reasoning from the history of the Fourth Amendment, the Court concluded that the Fourth Amendment’s purpose was “to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.” *Id.* at 266. Thus, the Court concluded that the term “people” in the Fourth Amendment refers to the people of the United States, and the Amendment therefore does not afford protection to aliens outside the jurisdiction of the United States. *See id.* at 266–67.

103. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950).

104. *Id.* at 770.

105. *Id.*; *Cf. Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Zadvydas v. Davis*, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) (“The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens.”).

106. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (holding that an alien’s “constitutional status changes” only after he “gains admission to our country and begins to develop the ties that go with permanent residence”).

107. The Court’s determination that unlawfully present aliens are, in fact, accorded certain basic protections under the Fifth Amendment’s Due Process Clause is based, in part, on a textualist analysis of the Constitution. The Fifth Amendment provides, in

The Court has held, for example, that unlawful aliens are entitled to due process rights before deportation.¹⁰⁸ These basic procedural due-process rights, however, are limited, and the Supreme Court has never extended the full protections of the Fifth Amendment to this category of persons.¹⁰⁹

relevant part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. V. In contrast, the First, Second, Fourth, Ninth, and Tenth Amendments refer to “the people.” See U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .”); U.S. CONST. amend. II (protecting “the right of the people to keep and bear Arms”); U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”); U.S. CONST. amend. IX (referring to unenumerated rights “retained by the people”); U.S. CONST. amend. X (reserving rights not delegated to the United States or prohibited by the states “to the States respectively, or to the people”). The Court has used the whole act canon of construction to determine that this difference in language was intentional. See Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 967 (2016) (“[T]he ‘meaningful variation’ subpart of the whole act rule . . . holds that when Congress includes particular language in one section of a statute but omits it in another section of the same statute, courts should presume that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”). In fact, in *Verdugo-Urquidez*, the Court rejected the American Civil Liberties Union’s suggestion that the Framers used the phrase “the people”—instead of “person”—“simply to avoid [an] awkward rhetorical redundancy.” *Verdugo-Urquidez*, 494 U.S. at 265. Instead, the Court reasoned that the term “‘the people’ seems to have been a term of art employed in select parts of the Constitution.” *Id.* at 265–66. Thus, while the Court has construed the term “person” in the Fifth Amendment to include unlawfully present aliens, see *Plyler v. Doe*, 457 U.S. 202, 210–12 (1982), it has read the First, Second, Fourth, Ninth, and Tenth Amendments to extend only to protect the “class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *Verdugo-Urquidez*, 494 U.S. at 265–66. But beyond basic procedural due process protections afforded to any “person” under the Fifth Amendment, unlawfully present aliens do not receive full Fifth Amendment rights unless “they have come within the territory of the United States and developed substantial connections with this country.” *Verdugo-Urquidez*, 494 U.S. at 271.

108. See, e.g., *Demore v. Kim*, 538 U.S. 510, 523 (2003) (stating that it is “well established” that aliens have due process rights in deportation hearings).

109. Lower courts, have, however, carved out a constitutional protection against abuse for unlawfully present aliens. Specifically, the Fifth Circuit has held that the Fourth Amendment protects unlawfully present aliens from “gross physical abuse” or “wanton or malicious infliction of pain” by government agents. See, e.g., *Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014) (recognizing that an unlawful alien in immigration custody is protected under the Fourth Amendment from “gross physical abuse” or “wanton or malicious infliction of pain” by government officials); cf. *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (“[W]hatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the due process clauses of the [F]ifth and [F]ourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.”). This exception for gross physical abuse undermines the *Garza* majority’s fear that, without full constitutional protections, “[d]etainees would have no right to any medical treatment or protection from abuse by other detainees,” and “[t]hose with diabetes or suffering heart attacks could be left to die while their governmental custodian watches.” *Garza* Panel Dissent at 9. Whether this exception for gross physical abuse comports with the Constitution is another question entirely—one that goes beyond this Article’s scope. It is worth noting, however, that “[t]he Constitution does not, and need not, answer every ques-

Thus, apart from minimal procedural protections, *Eisentrager* and *Verdugo-Urquidez* require both substantial connections and entry into U.S. territory before a noncitizen may invoke constitutional rights.¹¹⁰ Although the Supreme Court has not articulated how lower courts are to assess what constitutes a “substantial connection” to the country, it requires at least some showing of “previous significant voluntary connection with the United States.”¹¹¹ And in case after case, the circuits¹¹²—including the D.C. Circuit¹¹³—have uniformly applied *Verdugo-Urquidez* and required a showing of both substantial connections and presence in the United States before concluding that a noncitizen is entitled to full constitutional protections. The en banc court in *Garza*, however, required neither.

Indeed, neither Judge Millett’s panel dissent—which the en banc Court adopted as its majority opinion—nor her en banc concurrence even acknowledges *Verdugo-Urquidez*’s test for noncitizens seeking to

tion.” See *Garza v. Hargan*, 874 F.3d 735, 751 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017). As Judge Henderson observed in her en banc dissent, there are myriad other safeguards—beyond recourse to the Constitution—to protect against the outlandish scenarios the *Garza* majority imagined. See, e.g., *id.* at 750–51 (“The United States remains a signatory to the U.N. Convention Against Torture; our law imposes civil liability on government agents who commit torts and criminal liability on those who commit crimes; and counsel have access to detained alien minors, as have J.D.’s counsel.”).

110. In fact, the Supreme Court has dismissed as “futile” attempts by aliens outside the country to invoke the protections of the Bill of Rights. See *Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953) (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But *once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.*” (emphasis added) (internal quotations omitted)); see also *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (“Th[e] provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))).

111. *Verdugo-Urquidez*, 494 U.S. at 271. See also *Ibrahim v. Dep’t of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012) (holding that studying at Stanford University for four years qualified as a “significant voluntary connection”).

112. See, e.g., *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 448–49 (3d Cir. 2016) (“[A]s recent surreptitious entrants deemed to be aliens seeking initial admission to the United States, Petitioners are unable to invoke the Suspension Clause, despite their having effected a brief entrance into the country prior to being apprehended for removal.” (internal quotations and alterations omitted)); *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006) (acknowledging that there are “cases in which an alien’s connection with the United States is so tenuous that he cannot reasonably expect the protection of its constitutional guarantees,” but holding that “the nature and duration of [the plaintiff’s] contacts with the United States [were] sufficient to confer Fourth Amendment rights”); *Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) (“As an unadmitted alien present in the United States, Albathani’s due process rights are limited.”).

113. See, e.g., *Al Bahlul v. United States*, 840 F.3d 757, 796 (D.C. Cir. 2016) (Millett, J., concurring) (citing *Verdugo-Urquidez*, 494 U.S. at 261, for the proposition that “it is settled that certain . . . constitutional provisions do not protect aliens outside the sovereign United States”); *Al Bahlul v. United States*, 767 F.3d 1, 32 (D.C. Cir. 2014) (“[T]here is no holding by any court that an unlawful alien enemy combatant detained abroad is entitled to the protections of the Ex Post Facto Clause.”).

avail themselves of the Constitution's protections. And this omission was not an oversight.¹¹⁴ Judge Millett—who authored the *Garza* majority opinion—was well aware of *Verdugo-Urquidez*'s two-part test. In fact, precisely one year before her panel dissent in *Garza*, Judge Millett authored a concurrence in *Al Bahlul v. United States*, in which the D.C. Circuit addressed a criminal defendant's challenges to his conviction and sentence by a military commission.¹¹⁵ In her concurrence in that case, Judge Millett concluded that the defendant's claim that he had a right to a jury trial should be rejected because, under *Verdugo-Urquidez*, "certain . . . constitutional provisions do not protect aliens outside the sovereign United States."¹¹⁶ While the difference between a war criminal detained outside the United States and an unlawfully present alien detained at the border may have some constitutional significance, the *Garza* majority did not even mention *Verdugo-Urquidez*, let alone try to distinguish it on that basis. Judge Millett's acceptance of *Verdugo-Urquidez*'s precedential value in *Al Bahlul*, coupled with her failure to even acknowledge the case in *Garza*, illustrates the *Garza* majority's willingness to utilize any means—including selective amnesia—to protect the abortion right.

In any event, had the *Garza* majority properly applied the *Verdugo-Urquidez* test to this case, the undisputed facts would have established that J.D. did not satisfy either of *Verdugo-Urquidez*'s requirements. First, J.D. did not allege a single fact supporting a finding of substantial connections with the United States.¹¹⁷ And it is plain that she could not; aside from her thirty-six-day detention in federal custody, J.D. had no connections with the United States.¹¹⁸ There is no basis in the law or common sense to believe that an unlawful alien's involuntary federal detention constitutes a "substantial connection" with the United States.¹¹⁹

Second, J.D. did not establish that she was present within the United States.¹²⁰ J.D. was detained immediately upon crossing the

114. This omission also circumvents traditional modes of constitutional analysis. See *Meachum v. Fano*, 427 U.S. 215, 223–24 (1976) (explaining that the initial inquiry in assessing the constitutionality of state action is whether a constitutional right was infringed in the first place).

115. *Al Bahlul*, 840 F.3d at 757.

116. *Id.* at 796; see also *id.* ("If anything, precedent undermines *Al Bahlul*'s claim.").

117. *Garza v. Hargan*, 874 F.3d 735, 744 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017).

118. *Id.*

119. See *supra* note 111 and accompanying text (explaining that *Verdugo-Urquidez* requires some showing of "previous significant *voluntary* connection with the United States" (emphasis added)).

120. In her complaint, J.D. explained that she "was detained by the federal government and placed in a federally funded shelter." *Garza*, 874 F.3d at 743 (Henderson, J., dissenting). This admission undermines any claim of being present in the United States. See *Leng v. Barber*, 357 U.S. 185, 188 (1958) (holding that, where an alien is

border.¹²¹ The Supreme Court has made clear that there is a material difference between aliens who have entered the United States—even if illegally—and aliens who have only made it to the border. Those aliens “who are merely ‘on the threshold of initial entry’” do not enjoy all the constitutional rights and privileges of those who have successfully crossed the border, even if unlawfully.¹²²

Instead of assessing *Verdugo-Urquidez*’s presence requirement, however, the *Garza* majority adopted wholesale the panel dissent’s dubious assertion that “[t]he Supreme Court has long recognized that immigrants who lack lawful status are protected persons under the Due Process Clause.”¹²³ For this proposition, the majority opinion cites *Zadvydas v. Davis*, but the Supreme Court in that case expressly limited the Due Process Clause’s applicability to “aliens who were admitted to the United States but subsequently ordered removed.”¹²⁴ The Court made clear that “once an alien *enters* the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”¹²⁵ And an excludable alien who has been denied entry, even if technically within U.S. territory, is “treated, for constitutional purposes, as if stopped at the border.”¹²⁶ *Zadvydas* thus plainly does not stand for the proposi-

detained pending determination of his admissibility, he is not legally within the United States).

121. *Garza*, 874 F.3d at 743 (Henderson, J., dissenting).

122. *Leng*, 357 U.S. at 187 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)). Courts refer to this doctrine as the “entry fiction” because it treats detention as a continuation of exclusion, such that an alien who is detained while seeking admission has not “entered” the United States, even though physically present within the country’s borders. *See, e.g.,* *Castro v. Cabrera*, 742 F.3d 595, 599–600 (5th Cir. 2014) (discussing the entry fiction doctrine); *Wong v. United States INS*, 373 F.3d 952, 971 (9th Cir. 2004) (same); *Ngo v. INS*, 192 F.3d 390, 397 (3d Cir. 1999) (same), *amended* (Dec. 30, 1999). There is, however, some confusion in the case law regarding how the entry fiction should apply when assessing the scope of an unlawful alien’s constitutional rights. *See infra* note 126.

123. *Garza* Panel Dissent at 9.

124. *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001). The Court explicitly clarified that “[a]liens who have not yet gained initial admission to this country would present a very different question.” *Id.*

125. *Id.* at 693 (emphasis added).

126. *Id.* (internal quotations omitted). Some confusion exists in the case law regarding the circumstances under which the entry fiction is applicable. There is no known dispute that the entry fiction bars unlawfully present aliens from raising a procedural challenge to their detention under the Fifth Amendment. *See, e.g.,* *Wong*, 373 F.3d at 971 (“The entry fiction . . . appears determinative of the procedural rights of aliens with respect to their applications for admission.”). It is less clear, however, how—if at all—the entry fiction applies to Fifth Amendment substantive due process protections. *Compare id.* at 974 (“[T]he entry fiction does not preclude non-admitted aliens . . . from coming within the ambit of the equal protection component of the Due Process Clause.”), and *Ngo*, 192 F.3d at 396 (“Even an excludable alien is a ‘person’ for purposes of the Fifth Amendment and is thus entitled to substantive due process.”), *with* *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1449 (9th Cir. 1995) (en banc) (“[W]hile it is . . . clear that excludable aliens have no procedural due process rights in

tion that an alien who has unsuccessfully attempted to enter the United States is entitled to the full protections of the Constitution.¹²⁷ Indeed, the Court in *Zadvydas* recognized that “[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”¹²⁸ And for over a century, the law has been that “the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States.”¹²⁹ The majority’s interpretation of *Zadvydas* simply cannot be squared with the opinion’s text.¹³⁰

In lieu of applying precedent like *Zadvydas*, the majority justified its result, in part, by condemning the suggestion that J.D. does not

the admission process, the law is not settled with regard to nonprocedural rights.”), and *Castro*, 742 F.3d at 600 (“[T]he doctrine of ‘entry fiction’ . . . applie[s] to excludable aliens regarding the constitutionality of indefinite detention and, more specifically, the applicability of substantive and procedural due process rights under the Fifth Amendment.”). But even if the entry fiction did not apply to J.D.’s substantive Fifth Amendment claim in *Garza*, she still would fail the second element of the *Verdugo-Urquidez* test because she cannot show substantial connections with the United States. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

127. See *Verdugo-Urquidez*, 494 U.S. at 271 (clarifying that the *Plyler* line of cases “establish[es] only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country”).

128. *Zadvydas*, 533 U.S. at 693; see also *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (holding that, “although physically within our boundaries,” an alien who was denied entry “is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate”). This doctrine is consistent with the Supreme Court’s general declaration that “those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.” *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

129. *Leng v. Barber*, 357 U.S. 185, 188 (1958). In *Leng*, which was decided in 1958, the Court noted that the entry fiction has been the law “[f]or over a half century.” *Id.* Thus, the entry fiction had been established precedent for over a century at the time of the D.C. Circuit’s decision in *Garza*.

130. This selective reading of *Zadvydas* is not the only way in which the *Garza* majority misreads—or mischaracterizes—Supreme Court law on this point. The majority also relies on *Jean v. Nelson*, 472 U.S. 846 (1985), for the proposition that “regardless of immigration status, aliens within the territorial jurisdiction of the United States are ‘persons’ entitled to due process under the Constitution.” See *Garza* Panel Dissent at 9. But the majority is wrong for two reasons. First, the portion of *Jean* that it cites is Justice Marshall’s dissent, not the majority opinion. See *id.* Justice Rehnquist, writing for the majority in that case, expressly invoked the constitutional-avoidance doctrine and did not decide whether unlawfully present aliens may invoke Fifth Amendment protections. *Jean*, 472 U.S. at 857. Second, the *Garza* majority cites the dissent in *Jean* for a proposition it does not support. Although Justice Marshall would have reached the constitutional question, he acknowledged that the Constitution does not necessarily require “that the rights of unadmitted aliens be coextensive with those of citizens.” *Id.* at 876 (Marshall, J., dissenting). Instead, he called for the Court to determine the scope of those aliens’ due process and equal protection rights. *Id.* at 876–77. The *Garza* majority’s insistence that it is well-settled Supreme Court law that unlawfully present aliens with no connections to the United States are entitled to the full scope of Fifth Amendment protections is wishful thinking, but it is not the law.

have full Fifth Amendment rights—and thus “is not a ‘person’ in the eyes of our Constitution”—as “deeply troubling.”¹³¹ But holding that J.D. is not entitled to Fifth Amendment rights says nothing of her human dignity or her personhood. As Judge Henderson pointed out in her en banc dissent, “‘American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.’”¹³² No one, however, would suggest that members of the military are not “persons” simply because they lack Fifth Amendment protections.¹³³ The majority’s suggestion that J.D.’s human dignity is dependent upon her status as a “person” within the meaning of the Fifth Amendment is similarly unconvincing.

In failing even to mention the *Verdugo-Urquidez* standard for determining noncitizens’ constitutional rights, and instead automatically granting J.D. the full scope of Fifth Amendment rights, the *Garza* majority broke with over a century of precedent—both in constitutional law and in immigration law. By so holding, the D.C. Circuit not only sidestepped well-established precedent, but also elevated the Fifth Amendment right to abortion above every other constitutional right. For example, the Supreme Court has held that an excludable alien is not protected by the First Amendment on the ground that “[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law.”¹³⁴ The Court has also determined that unlawful aliens cannot invoke Fourth Amendment protections¹³⁵ or the Fifth and Sixth Amendment jury trial rights.¹³⁶ And the circuits have uniformly held that the Second

131. *Garza* Panel Dissent at 9.

132. *Garza v. Hargan*, 874 F.3d 735, 751 n.11 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950)), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017).

133. *Id.*

134. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904). *See also, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 362 (2010) (noting the existence of a federal statute, now codified at 52 U.S.C. § 30121, which bans foreign nationals from making contributions or expenditures for political speech); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (holding that an alien may be excluded from entry to the United States for engaging in pro-communist speech); *Galvan v. Press*, 347 U.S. 522, 531 (1954) (upholding as constitutional a statute that required deportation of any alien who, at the time of entry or thereafter, was a member of the Communist Party).

135. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990) (holding that the Fourth Amendment does not apply to a Mexican citizen and resident with no voluntary attachment to the United States). The Fifth Circuit has carved out an exception for unlawfully present aliens seeking to invoke the Fourth Amendment, but it has held that the Amendment’s protections apply *only* where those aliens allege claims of gross physical abuse by government officials. *See supra* note 109.

136. *Eisentrager*, 339 U.S. at 784–85 (rejecting the notion that alien enemies are entitled to “rights to jury trial as in the Fifth and Sixth Amendments” and holding “that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy”).

Amendment does not protect the rights of unlawful aliens to keep and bear arms.¹³⁷ If *Garza* is not vacated, then, an unlawfully present alien may not challenge the warrantless search of her home, seek a trial by jury, or possess a firearm for self-defense, but she may obtain a government-facilitated abortion on demand. The Constitution does not countenance such an absurdity.

Unsurprisingly, the *Garza* majority offered no justification for its special treatment of the abortion right because none exists—there is no basis in law or fact to grant greater protection to the abortion right than to the Constitution’s enumerated protections. An abortion on demand is a substantive liberty, much like the freedom of speech, the freedom of association, and the freedom to keep and bear arms, all of which have been explicitly denied to unlawfully present aliens with no substantial connections to the United States.¹³⁸ And while unlawful aliens may be entitled to certain limited Fifth Amendment procedural due-process protections during immigration proceedings,¹³⁹ the Supreme Court has affirmatively rejected claims that unlawful aliens are entitled to the full scope of the Fifth Amendment’s enumerated rights.¹⁴⁰ If unlawfully present aliens cannot invoke the protections that actually appear in the text of the Fifth Amendment, there is no basis to conclude that they are entitled to the judicially created abor-

137. Although the Supreme Court has not addressed this issue, the circuits that have are uniform in holding that unlawful aliens are not entitled to any Second Amendment protections. *See, e.g.,* *United States v. Carpio-Leon*, 701 F.3d 974, 976 (4th Cir. 2012) (“[T]he Second Amendment does not extend to provide protection to illegal aliens, because illegal aliens are not law-abiding members of the political community and aliens who have entered the United States unlawfully have no more rights under the Second Amendment than do aliens outside of the United States seeking admittance.”); *United States v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011) (“Whatever else the term means or includes, the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States”); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (*per curiam*) (“[T]he protections of the Second Amendment do not extend to aliens illegally present in this country”); *cf. United States v. Meza-Rodriguez*, 798 F.3d 664, 669–672 (7th Cir. 2015) (holding that an unlawfully present alien was entitled to Second Amendment rights under the *Verdugo-Urquidez* standard because he had substantial connections with the United States, including, *inter alia*, the fact that he lived in the United States for over twenty years).

138. *See supra* notes 134, 137 and accompanying text.

139. Under *Eisentrager*’s sliding scale approach, the Supreme Court has extended certain basic constitutional procedural protections in immigration proceedings to those unlawfully present aliens who do not satisfy the *Verdugo-Urquidez* test. *See supra* notes 107–08 and accompanying text.

140. *See supra* notes 103–10 and accompanying text; *Eisentrager*, 339 U.S. at 784–85 (“If the Fifth Amendment confers its rights on all the world . . . , the same must be true of the companion civil-rights Amendments, [including] rights to jury trial as in the Fifth and Sixth Amendments. . . . Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.”).

tion right that the Supreme Court has crammed into that Amendment. In holding otherwise, the *Garza* majority erected a two-tier structure of constitutional rights: first, those that appear in the text of the Constitution, and second, the abortion right. The D.C. Circuit's disparate treatment of the enumerated rights has no basis in the Constitution, and the Supreme Court should seize this opportunity to correct it.

B. *The D.C. Circuit's Garza Decision Exemplifies the Larger Jurisprudence of Abortion Exceptionalism that Plagues the Case Law*

One might question why the D.C. Circuit so flippantly disregarded long-standing principles of constitutional and immigration law to carve out a new right to elective abortion for unlawful aliens.¹⁴¹ But the court's expansion of the abortion right in *Garza*—while troubling—should come as no surprise given the Supreme Court's increasing willingness to make special exceptions for its favored rights.¹⁴² And of those favored rights, the Court has consistently elevated the

141. In addition to its disregard for the Constitution and federal immigration laws, the D.C. Circuit also showed its indifference toward the Federal Rules of Appellate Procedure—and traditional Circuit practice—by voting for en banc rehearing in *Garza*. En banc rehearing is reserved for cases that involve “a question of exceptional importance.” Fed. R. App. P. 35(a); see also *supra* notes 79–81 and accompanying text. As Judge Kavanaugh emphasized in his en banc dissent, the per curiam panel order was unpublished and had no precedential value. See *Garza v. Hargan*, 874 F.3d 735, 756 n.6 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017); see also *supra* notes 79–84 and accompanying text. There was accordingly no basis for holding en banc rehearing of *Garza*. In fact, only a few weeks prior to its en banc decision in *Garza*, the D.C. Circuit declined to rehear en banc a Second Amendment challenge to a Washington, D.C. concealed-carry law. See *Mandate, Wrenn v. D.C.*, No. 16-7025 (D.C. Cir. Oct. 6, 2017). In *Wrenn*, a panel of the D.C. Circuit struck down as unconstitutional a Washington, D.C. gun law that limited the issuance of concealed-carry licenses to those with a special need for self-defense. *Wrenn v. D.C.*, 864 F.3d 650 (D.C. Cir. 2017). After Washington, D.C. petitioned for rehearing en banc, the court denied its petition, presumably because the case did not satisfy the requirements for en banc review under Federal Rule of Appellate Procedure 35(a). See *Mandate, Wrenn*, No. 16-7025 (D.C. Cir. Oct. 6, 2017). If the proper application of the Second Amendment—which is actually enumerated in the Constitution's text—is not “a question of exceptional importance” meriting en banc review, it is inexplicable how an unpublished—and therefore non-precedential—application of the abortion right could possibly satisfy that standard.

142. Justice Thomas has traced the Court's practice of creating special protections for its favored rights back to the famous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2328–29 (2016) (Thomas, J., dissenting). According to Justice Thomas, although the footnote was “pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution.” *Id.* at 2329. This “new taxonomy of preferred rights” has resulted in a body of constitutional law that is “now so riddled with special exceptions for special rights that [the Supreme Court's] decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.” *Id.* at 2328, 2321.

abortion right above the rest. In doing so, traditional modes of interpretation have fallen to the wayside to ensure the further entrenchment of unfettered abortion access in the law. As Justice O'Connor remarked in a pre-*Casey* dissent, "[t]oday's decision . . . makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving . . . regulation of abortion."¹⁴³ The D.C. Circuit's nullification of the constitutional significance of citizenship in *Garza* is only the latest example.

The Supreme Court's insidious jurisprudence of abortion exceptionalism does not play favorites; rather, it demolishes any legal obstacle that stands in the path of expansive abortion rights,¹⁴⁴ including the Constitution's enumerated rights.¹⁴⁵ And in the wake of *Roe*, the

143. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Justice O'Connor went on to rebuke the Court for being seemingly incapable of addressing abortion regulations with the same neutrality it applies to other constitutional issues. *See id.* ("The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but—except when it comes to abortion—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.").

144. For example, in *Sendak v. Arnold*, the Supreme Court summarily affirmed a lower court ruling striking down an Indiana statute requiring physicians to perform first trimester abortions in a hospital or licensed health facility. *Sendak v. Arnold*, 429 U.S. 968 (1976). In his dissent in that case, Justice White admonished the Court for treating abortion differently than any other constitutional right, arguing that "[n]ormal principles of constitutional adjudication [should] apply even in cases dealing with abortion." *Id.* at 972 (White, J., dissenting). He further criticized the majority for "elevat[ing] the decision to have an abortion to a higher constitutional status than the decision to have life-saving or health-preserving operations." *Id.* at 969.

145. The Court has been willing to curb and limit other constitutional rights where the right to abortion is at stake. For example, in *Hill v. Colorado*, the Supreme Court upheld, over a First Amendment challenge, a criminal statute prohibiting any person from speaking within eight feet of another person near a healthcare facility. *Hill v. Colorado*, 530 U.S. 703, 707 (2000). Petitioners in that case had engaged in sidewalk counseling outside abortion facilities, and they feared prosecution under the new statute. *Id.* at 708. But the Court rejected their request for a declaration that the law violated the First Amendment. *Id.* at 710. In so holding, the Court reasoned that the regulation was not a regulation of speech, but rather a regulation of the places where speech may occur. *Id.* at 731. It further concluded that even though the regulation targeted specific categories of speech, including protest, education, and counseling, it was not "content-based," and thus needed only to survive the less rigorous scrutiny applied to content-neutral time, place, and manner restrictions. *Id.* at 724–25. The Court ultimately held that the regulation did, in fact, survive that less stringent standard of review because it served a narrowly tailored government interest in protecting citizens' right to be let alone, *id.* at 716–17, 725–26, despite the fact that the Government expressly disavowed that alleged interest, *id.* at 750 (Scalia, J., dissenting). In his dissent, Justice Scalia lambasted the Court for reaching such "remarkable conclusions" that were "incompatible with the guarantees of the First Amendment." *Id.* at 741 (Scalia, J., dissenting). He acknowledged, however, that none of the Court's questionable logical maneuvering should come as a surprise, in light of the fact that no enumerated constitutional right, even the freedom of speech, can stand up to the judicially created right to abortion. *Id.*; *see also* *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring in judgment) ("Today's opinion carries forward this

Court's "ad hoc nullification machine" has invalidated longstanding legal principles and doctrines of constitutional law where the majority has perceived them to pose a threat—real or imagined—to abortion access.¹⁴⁶ The areas of law now riddled with the Supreme Court's abortion-specific exceptions are many. But two stand out in particular: (1) third-party standing doctrine, and (2) the constitutional tiers of scrutiny.¹⁴⁷ Together, the distortions of the law in these two areas illustrate the overarching jurisprudence of abortion exceptionalism in which *Garza* finds its doctrinal roots.

1. Third-Party Standing Doctrine

Much like the D.C. Circuit's indifference toward a century of constitutional law in *Garza*, the Supreme Court has nullified its traditional prohibition on third-party standing to create more flexibility for litigants seeking to challenge abortion regulations. The third-party standing doctrine dictates that a party does not have standing to sue when seeking to assert the rights of others.¹⁴⁸ Historically, the Supreme Court has "not looked favorably upon third-party standing,"¹⁴⁹ but it has recognized that "there may be circumstances where it is necessary to grant a third party standing to assert the rights of another."¹⁵⁰ Even in those limited instances, however, the Court has required that the party show a close relationship with the person who possesses the right and establish that the possessor faces a "hin-

Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.").

146. See, e.g., *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) ("What is before us, after all, is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the 'ad hoc nullification machine' that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice."); *Stenberg v. Carhart*, 530 U.S. 914, 1020 (2000) (Thomas, J., dissenting) ("More medically sophisticated minds than ours have searched and failed to identify a single circumstance (let alone a large fraction) in which partial birth abortion is required. But no matter. The 'ad hoc nullification' machine is back at full throttle."); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 785 (1994) (Scalia, J., dissenting) ("Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.").

147. As Justice Thomas noted in his *Whole Woman's Health* dissent, these two areas of law have fallen victim to the "Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting).

148. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

149. *Id.* at 130. See also *Whole Woman's Health*, 136 S. Ct. at 2321–23 (Thomas, J., dissenting) (providing a history of the Court's third-party standing jurisprudence).

150. *Kowalski*, 543 U.S. at 129–30.

drance” to asserting his own rights.¹⁵¹ But when it comes to the abortion right, the Supreme Court has imposed no such requirements.¹⁵²

Instead, the Court has held that doctors and abortion clinics may challenge state and federal abortion regulations on behalf of hypothetical female patients.¹⁵³ The Court has accordingly relieved those doctors and clinics from having to satisfy the “hindrance” requirement.¹⁵⁴ In fact, much like the *Garza* majority’s failure to acknowledge *Verdugo-Urquidez*’s test for noncitizens seeking to avail themselves of constitutional protections, the Supreme Court has not even questioned whether doctors or abortion clinics can assert vicariously the abortion rights of hypothetical women, but instead has merely assumed that they may.¹⁵⁵ As Justice Thomas has observed, “[a]bove all, the Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child.”¹⁵⁶

151. *Id.*

152. See *Whole Woman’s Health*, 136 S. Ct. at 2322 (Thomas, J., dissenting) (“[T]he Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake.”).

153. See *Singleton v. Wulff*, 428 U.S. 106 (1976) (plurality opinion). In *Singleton*, a plurality of the Supreme Court held that a physician or clinic may assert the substantive due process right to abortion of a hypothetical female patient. But, as is frequently the case when the abortion right is at stake, the plurality did not conduct an exacting analysis of the requirements for third-party standing. Specifically, the Court did not explain how women would be hindered from asserting their own abortion rights. *Id.* Justice Blackmun, writing for a plurality of the Court, half-heartedly attempted to fit the Court’s ruling within the “close relationship” and “hindrance” criteria traditionally applied where a litigant is seeking to assert the rights of another party not before the Court. *Id.* Ultimately, however, he concluded that allowing physicians to assert the rights of female patients was proper because doing so would result in “little loss in terms of effective advocacy.” *Id.* at 118. But if effective advocacy were the material basis for the general prohibition on third-party standing—let alone a legitimate ground for nullifying a longstanding prudential doctrine—the Court has never said so.

154. See *id.* at 119–21. It is worth noting that many women have, in fact, litigated their abortion rights, unhindered, all the way to the Supreme Court. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 429 (1990) (naming “six pregnant minors representing a class of pregnant minors” as among the plaintiffs); *Maier v. Roe*, 432 U.S. 464, 467 (1977) (plaintiffs were “two indigent women”). Were the Court to conduct an honest application of the third-party-standing doctrine, then, doctors and abortion clinics would necessarily fail to satisfy the “hindrance” requirement.

155. For example, in *Stenberg*, a Nebraska physician who performed abortions sought a declaration that a Nebraska abortion regulation violated hypothetical women’s abortion rights. *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000). The Court never once acknowledged the potential third-party standing problems that would ordinarily arise in such a context. Instead, the Court merely proceeded to conduct *Casey*’s undue-burden analysis on the assumption that physicians may assert women’s abortion rights. See *id.* at 921–22. And most recently, in *Whole Woman’s Health*, the Court entertained a challenge to a Texas abortion statute brought by abortion providers without ever addressing whether those abortion providers should be permitted to bring the suit in the first place. See *Whole Woman’s Health*, 136 S. Ct. at 2292.

156. *Whole Woman’s Health*, 136 S. Ct. at 2323 (Thomas, J., dissenting).

This lackadaisical treatment of third-party standing in the abortion context is markedly different from the Court's strict adherence to the doctrine where other constitutional rights are at stake. For example, the Supreme Court does not allow a party to assert vicariously Fourth Amendment rights.¹⁵⁷ Nor does it permit an individual to invoke another party's Fifth Amendment right against self-incrimination.¹⁵⁸ And it does not permit a lawyer to assert vicariously the Sixth Amendment rights of a potential client.¹⁵⁹ This disparity in treatment between rights that are actually enumerated in the Constitution and the judicially created right to abortion is staggering and is made worse by the fact that the Court has not even attempted to justify it.¹⁶⁰ It is no wonder, then, that the D.C. Circuit felt unconstrained from pronouncing an unjustified extension of the abortion right to unlawfully present aliens in *Garza*.

2. The Constitutional Tiers of Scrutiny

Yet another example of the Supreme Court's jurisprudence of abortion exceptionalism is its manipulation of the constitutional tiers of scrutiny. Although none of the historical tiers of scrutiny—that is, rational-basis review, intermediate scrutiny, and strict scrutiny—that the Supreme Court applies to constitutional rights appear in the text of the Constitution, they have a “recognized basis in constitutional law.”¹⁶¹ In the abortion context, however, the Supreme Court has cast aside these traditional tiers of scrutiny in favor of the newly manufactured undue-burden standard, which lacks any “historical or doctrinal pedigree”¹⁶² and was fabricated “largely out of whole cloth by the au-

157. See, e.g., *Alderman v. United States*, 394 U.S. 165, 171–72 (1969) (“The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Co-conspirators and codefendants have been accorded no special standing.”).

158. *Rakas v. Illinois*, 439 U.S. 128, 140 n.8 (1978) (“[T]he Fifth Amendment privilege against self-incrimination, . . . is a purely personal right.”).

159. *Kowalski v. Tesmer*, 543 U.S. 125, 130–32 (2004). In *Kowalski*, two attorneys sought to challenge an amendment to Michigan's constitution that prohibited appointment of appellate counsel for indigent criminal defendants who pleaded guilty. *Id.* at 127. The Supreme Court held that the attorneys did not have standing to assert the rights of hypothetical criminal defendants with whom they might have a future attorney-client relationship. *Id.* at 130–31. In so holding, the Court assessed the “hindrance” requirement for third-party standing and reasoned that criminal defendants without counsel were not hindered from challenging the amendment because there existed “open avenues to argue that denial [of appellate counsel] deprives [them] of [their] constitutional rights.” *Id.* at 131–32.

160. See *Whole Woman's Health*, 136 S. Ct. at 2322 (Thomas, J., dissenting).

161. *Planned Parenthood v. Casey*, 505 U.S. 833, 964–65 (1992) (Rehnquist, C.J., concurring in judgment in part and dissenting in part). Cf. *Whole Woman's Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting) (“Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage.”).

162. *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000) (Thomas, J., dissenting).

thors of the [plurality opinion in *Casey*].”¹⁶³ No other constitutional right is subject to this amorphous standard of review, and thus no other enumerated right is shrouded in such uncertainty regarding how forcefully it will be protected.¹⁶⁴

Like the D.C. Circuit’s indifference toward the constraints of precedent in *Garza*, the Supreme Court has applied the undue-burden standard in an inconsistent and unprincipled manner, so that undue-burden review, in practice, has proven more fatal to state regulations than even the strictest brand of scrutiny.¹⁶⁵ Instead of deferring to state legislatures where they have “a rational basis to act” and where regulations do not “impose an undue burden”—as *Casey* instructed¹⁶⁶—the Court has substituted its own judgment for that of the legislatures.¹⁶⁷ As Justice Thomas has pointed out, the Court has so

163. *Casey*, 505 U.S. at 964 (Rehnquist, C.J., concurring in judgment in part and dissenting in part). As Justice Scalia observed in his dissent in *Casey*, the undue-burden standard is “a unique concept created specifically for these cases, to preserve some judicial foothold in this ill-gotten territory.” *Id.* at 988 (Scalia, J., concurring in judgment in part and dissenting in part).

164. *But see Whole Woman’s Health*, 136 S. Ct. at 2328 (Thomas, J., dissenting) (“It is tempting to identify the Court’s invention of a constitutional right to abortion in [*Roe*] as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment.”). Justice Thomas went on to explain how the Court has been creating a “taxonomy of preferred rights” since the late 1930s. *Id.*; see also *supra* note 142. According to Justice Thomas, the Court’s abortion exceptionalism is just another example of its broader practice of creating ad hoc exceptions for certain rights “that seem especially important to vindicate.” *Whole Woman’s Health*, 136 S. Ct. at 2329 (Thomas, J., dissenting). The Court’s general unwillingness to apply one set of rules to adjudicate all constitutional rights is beyond this Article’s scope, but it is worth noting, as Justice Thomas did, that the Court’s tendency “to invent tolerable degrees of encroachment” depending on the political popularity of the right at issue has transformed constitutional law into a grab bag of “policy-driven value judgments.” *Id.* at 2329–30.

165. See, e.g., *Stenberg*, 530 U.S. at 914. In *Stenberg*, the Court struck down a ban on partial-birth abortion—a ban that thirty states attempted to adopt in some form—on the ground that it imposed an undue burden on a woman’s right to choose abortion. See *id.* at 1012–13 (Kennedy, J., dissenting). In his dissent, Justice Thomas criticized the Court for purporting to apply an undue-burden test but in fact applying an unprecedented level of scrutiny that is virtually impossible for any state to survive. *Id.* at 1020 (Thomas, J., dissenting) (“Under *Casey*, the regulation before us today should easily pass constitutional muster. But the Court’s abortion jurisprudence is a particularly virulent strain of constitutional exegesis.”).

166. *Whole Woman’s Health*, 136 S. Ct. at 2324 (Thomas, J., dissenting) (“*Casey* thus instructed courts to look to whether a law substantially impedes women’s access to abortion, and whether it is reasonably related to legitimate state interests.”); see also *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (“Where [the State] has a rational basis to act, and it does not impose an undue burden, [it] may use its regulatory power . . . in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.” (emphasis added)).

167. See *Whole Woman’s Health*, 136 S. Ct. at 2325–26 (Thomas, J., dissenting) (“[T]he majority overrules another central aspect of *Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion

badly skewed the law that a state can now discriminate on the basis of race in college admissions more easily than it can regulate abortion clinics, even though race-based discrimination is subject to strict scrutiny—a putatively more searching review than the undue-burden framework.¹⁶⁸ This reconfiguration of the tiers of scrutiny to protect and expand the abortion right is paradigmatic of the Court's larger jurisprudence of abortion exceptionalism from which the D.C. Circuit in *Garza* took its cue.

* * *

The Supreme Court's departure from precedent in the context of third-party-standing doctrine and the constitutional tiers of scrutiny

. . . . The State's burden has been ratcheted to a level that has not applied for a quarter century."). The Court signaled its willingness to reject the legislature's judgment most recently in *Whole Woman's Health*, in which the Court declared that "[t]he statement that legislatures, and not courts, must resolve questions of medical uncertainty is . . . inconsistent with this Court's case law." *Id.* at 2310. But this statement is at odds with the Court's traditional practice of deferring to legislative judgment. The judiciary has given "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. And the Court has applied the same principle of deference to other constitutional rights, holding that, when the legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Jones v. United States*, 463 U.S. 354, 370 (1983).

For example, where mentally ill criminal defendants have challenged their civil commitment under the Fifth Amendment's Due Process Clause, the Court has deferred to the legislature's decision to civilly commit those defendants, even where there was disagreement in the medical community regarding treatment for the mentally ill. *See, e.g., id.* at 370 (upholding as constitutional a D.C. statute that allowed the government to confine a criminal defendant to a mental institution where he established that he was not guilty by reason of insanity); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (upholding a Kansas statute that established civil commitment procedures for persons who are likely to engage in "predatory acts of sexual violence"). The Court has therefore deferred to legislative judgments on medical uncertainty even where doing so would result in the deprivation of an individual's Fifth Amendment liberty—a right mentioned by name in the Constitution's text—but it has declined to do the same where abortion is at stake.

168. *Whole Woman's Health*, 136 S. Ct. at 2327 (Thomas, J., dissenting). In *Fisher v. University of Texas at Austin*, a Caucasian applicant challenged the University of Texas's admissions process under the Fourteenth Amendment's Equal Protection Clause on the ground that it unconstitutionally discriminated against Caucasian students on the basis of race. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2202, 2207 (2016). Well-established precedent required the Court to apply strict scrutiny to the admissions process at issue because race-based classifications are subject to the most exacting form of judicial scrutiny. *See id.* at 2208. The Court accordingly purported to apply strict scrutiny to the University's "race-conscious" admissions program, and it held that the University satisfied that standard simply by identifying educational values it sought to promote through the program, including the State's desire to "cultivat[e] a set of leaders with legitimacy in the eyes of the citizenry." *Id.* at 2211. In his *Whole Woman's Health* dissent, Justice Thomas highlighted the absurdity of the fact that, by "tinker[ing] with levels of scrutiny to achieve its desired result," the State can discriminate on the basis of race—which is flatly prohibited by the Equal Protection Clause—more easily than it can regulate how abortion clinics operate. *Whole Woman's Health*, 136 S. Ct. at 2327.

illustrates that, while the D.C. Circuit's special exception for the abortion right in *Garza* has no place in the Constitution, it has firm grounding in the ever-expanding jurisprudence of abortion exceptionalism embraced by the nation's highest court. Together, these two paradigms demonstrate the process by which the Court has transformed the abortion right into a super-right, from which virtually no legal doctrine is immune. As Justice Scalia observed nearly two decades ago, the jurisprudential oddities in abortion law can be "chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue."¹⁶⁹ Given that the Court created the abortion right, it should hardly be surprising that the Court would be willing to bend all rules to protect it, and there is little wonder that the D.C. Circuit in *Garza* felt at liberty to do the same.

VII. CONCLUSION

While the examples of third-party-standing doctrine and the constitutional tiers of scrutiny by no means provide an exhaustive list of the Court's ad hoc nullification machine at work, they capture the intellectual contortions the Court is willing to perform to enshrine the abortion right. And the D.C. Circuit's decision in *Garza* confirms that the Supreme Court's practice of nullifying legal doctrines without explanation has trickled down to the lower courts. Indeed, heedless of its duty to apply the law faithfully, the *Garza* majority seized the opportunity to set the ad hoc nullification machine to "full throttle" once more, chewing through the distinction between citizenship and alien status.¹⁷⁰ Rather than conduct an honest application of the law to the facts of J.D.'s case and provide a reasoned basis for its decision, the court waxed poetic, claiming that J.D. came to America "yearning to breathe free."¹⁷¹ But J.D.'s "yearnings" aside, the majority identified no authority to support the relief J.D. sought.

The consequences of the D.C. Circuit's unabashed judicial activism in *Garza* cannot be overstated; the majority hollowed out the constitutional significance of U.S. citizenship, leaving behind a precarious precedent that will have far-reaching consequences if left uncorrected. There was, literally, a life on the line in *Garza*—a life that, if born,

169. *Stenberg*, 530 U.S. at 954 (Scalia, J., dissenting); see also *Hill v. Colorado*, 530 U.S. 703, 707 (2000) (Scalia, J., dissenting) ("[L]ike the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts.").

170. *Stenberg*, 530 U.S. at 1020 (Thomas, J., dissenting).

171. *Garza* Panel Dissent at 5. As Judge Henderson aptly noted in her en banc dissent, the majority's characterization of J.D.'s situation gave it "an undeservedly melodramatic flavor." *Garza v. Hargan*, 874 F.3d 735, 750 n.10 (D.C. Cir. 2017) (en banc) (Henderson, J., dissenting), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017). And although "J.D. may be sympathetic[.] . . . even the sympathetic are bound by longstanding law." *Id.*

would have unquestionably been entitled to constitutional rights. That life was ended as a result of the court's decision.¹⁷² But the impact of *Garza* extends beyond just J.D. and her unborn child. J.D. is not the only unlawfully present alien who will attempt to force the U.S. Government to facilitate an abortion. In fact, since the D.C. Circuit's decision in *Garza*, three additional pregnant, unaccompanied alien minors—Jane Moe, Jane Poe, and Jane Roe—joined J.D.'s case.¹⁷³ And on March 30, 2018, the district court granted their motion to certify a class of similarly situated plaintiffs, which the court defined as “all pregnant, unaccompanied immigrant minor children (UCs) who are or will be in the legal custody of the federal government.”¹⁷⁴ The district court's ruling also explicitly enjoined the Government from, *inter alia*, interfering with any of these class members' access to abortions.¹⁷⁵

The size of this newly certified class is not insignificant. During the 2017 fiscal year alone, 420 pregnant unaccompanied alien children were newly referred to ORR's care.¹⁷⁶ As of October 16, 2017, there were forty-three pregnant, unaccompanied alien children in ORR custody.¹⁷⁷ And eighteen of these pregnant unaccompanied alien children requested an abortion during the 2017 fiscal year.¹⁷⁸ This class certification is, of course, the inevitable result of the D.C. Circuit's decision in *Garza*. In fact, the *Garza* majority expressly anticipated that “other women and girls desperate to escape abuse, sexual trafficking, and forced prostitution undoubtedly will also find themselves on our shores and pregnant.”¹⁷⁹ But by holding that these women and girls are entitled to the Fifth Amendment abortion right, the *Garza* majority has transformed the Statue of Liberty's promise of freedom into one of abortions on demand.¹⁸⁰

172. See Petition for Writ of Certiorari at 15, *Azar v. Garza*, No. 17-654 (U.S. Nov. 3, 2017).

173. See Second Amended Complaint for Injunctive Relief, *Garza v. Hargan*, No. 17-cv-02122-TSC (D.D.C. filed Jan. 11, 2018).

174. Memorandum Order at 1, *Garza v. Hargan*, No. 17-cv-02122-TSC (D.D.C. Mar. 30, 2018).

175. See *id.* at 1–2.

176. Declaration of Jonathan White, Deputy Director for Children's Programs, ORR at ¶ 3, *Garza v. Hargan*, 17-cv-02122-TSC (D.D.C. Nov. 15, 2017).

177. *Id.*

178. *Id.* at ¶ 4.

179. *Garza* Panel Dissent at 9.

180. For an assessment of the additional burdens that *Garza* will force states to bear, see Brief for the States of Texas, Arkansas, Louisiana, Michigan, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, as Amici Curiae in Support of Petitioners at 21–25, No. 17-654 (Dec. 2017) (“If allowed to stand, the court of appeals' decision will only exacerbate th[e] losses [incurred due to unlawful immigration] by inviting everyone who reaches this country unlawfully—no matter how briefly—to demand the full scope of constitutional rights.”).

These practical consequences of *Garza*, coupled with the blatantly unconstitutional precedent it sets, make it an obvious candidate for certiorari. Indeed, if the Supreme Court does not vacate the D.C. Circuit's decision in this case, *Garza* will further expand the jurisprudence of abortion exceptionalism that robs legislatures of predictability and ultimately risks undermining the legitimacy of the judiciary. The Supreme Court must take action in *Garza* to dismantle the ad hoc nullification machine and correct this "grave constitutional wrong."¹⁸¹

181. *Garza v. Hargan*, 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc) (Millett, J., concurring), *petition for cert. filed*, No. 17-654 (U.S. Nov. 3, 2017).

